

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To be argued by
MICHAEL R. McGEE, ESQ.

77-2004

United States Court of Appeals

FOR THE SECOND CIRCUIT

VINCENT D. YANNI,
Petitioner-Appellant,
vs.

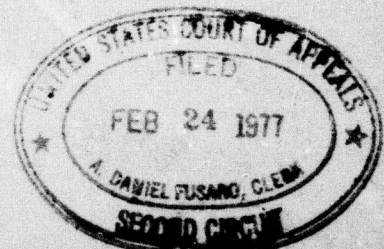
UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND APPENDIX OF PETITIONER- APPELLANT, VINCENT D. YANNI

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The conviction and sentence pursuant to which Petitioner-Appellant Yanni is being detained was imposed in violation of the due process clause of the Fourteenth Amendment in that there was and is substantial evidence that the Petitioner-Appellant Yanni was mentally incompetent at the time he stood trial and that the appellant's competency should have been determined at a hearing of same to have been directed by the court 7

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INTRODUCTION

The petitioner-appellant Vincent D. Yanni was indicted in 1972 for alleged violations of the federal narcotics laws. He went to trial with nine co-defendants on August 21, 1972, and the jury returned its verdict on September 19, 1972, at which time the appellant was convicted of conspiracy to distribute narcotics in violation of 26 U.S.C. Section 470 5 and 7237 (b) and Title 21 U.S.C. Section 846 under criminal indictment number 72-CR-810. On November 3, 1972, the Honorable Harold R. Tyler, Jr. of the United States District Court for the Southern District of New York sentenced the petitioner-appellant to eight (8) years imprisonment. The aforesaid sentence is presently being served by the appellant at the United States Correctional Institution in Danbury, Connecticut.

Upon numerous occasions during the aforesaid trial the trial court was made aware of the petitioner-appellant's extensive medical problems as is repeatedly indicated by the trial transcript itself. On September 2, 1972, during the trial proceedings, the court was informed that Mr. Yanni had suffered an epileptic fit and was in Pelham Bay General Hospital (TR at pp. 1481, 1507). Mr. Yanni had incurred a similar problem approximately one week previous (TR at p. 1494). Additionally, the petitioner's neurological problems had necessitated a previous court-ordered examination by Dr. Shanzer (TR at p. 1499).

In fact, the appellant's history of neurological and physical problem was noted by the record to have been caused by a head injury of considerable magnitude (TR at pp. 1505, 1516). The court was cognizant of the facts that Dr. Henry D. Messer, neurologist had treated Mr. Yanni since January, 1970

(TR at p. 1498); that Dr. Michael Nagle, neurologist, felt that Mr. Yanni needed immediate medical attention during the period around August 30, 1972 (TR at p. 1507); that Dr. Fine, neurologist, conducted tests on Mr. Yanni on September 5, 1972 (TR at p. 1508); and that Dr. Perotta had stated that Mr. Yanni was very sick (TR at p. 1515).

The above-mentioned events far from evidencing any sudden or temporary condition, followed a ten (10) year history of dizziness, passing out, and various extensive medical, mental and neurological problems (TR at p. 1520) and was supported by submission of various medical evidence as to the appellant's condition. (TR at p. 1523). The appellant's previous medical history prior to the trial and subsequent to the accident, which caused his brain damage, further included treatment by Dr. Messer (neurosurgeon); Dr. Vetter (psychiatrist); Dr. Bertero (M.D.) and Dr. Sisca (M.D.); and hospitalizations in the Metropolitan Hospital, the Flower Fifty Avenue Hospital, the Jacobi Hospital and a confinement to Bellevue for sixty (60) days (TR at p. 1517).

Furthermore, the court below was also made aware of the fact that the petitioner Yanni continued to have headaches, loss of memory, seizures and fainting spells even after the trial.

In consideration of all of the above-mentioned facts, petitioner-appellant by an application verified on the 28th of August, 1975 duly moved the United States District Court for the Southern District of New York pursuant to Title 28 U.S.C. Section 2255 to enter an order vacating his sentence. Petitioner alleged in his motion papers and supporting memorandums of law that he was entitled by law to have his sentence vacated and be granted a new trial in that he was medically and physically incompetent to assist in his defense,

to assist his counsel at trial or even to be able to properly listen to and understand the proceedings against him. It is the appellant's contention that had a proper medical and mental examination been conducted during the trial, the above mentioned factors would have been made evident to the court. Nevertheless, the trial transcript indicates that the only psychiatric examination done of the appellant Yanni during trial was based upon a brief and inadequate examination (TR at pp. 1519-20); and further while the court saw fit to allow the Government's physician Dr. Shanzer to examine the appellant on the basis of Dr. Shanzer's alleged "familiarity" with the appellant's medical history (TR at p. 1484) it has been noted that Dr. Shanzer saw the appellant for no more than three (3) minutes during which time he tapped the appellant on the knees with a rubber hammer to determine there was nothing wrong with him.

It is submitted that the foregoing factors have indeed presented a question of law as to the appellant's constitutional right to have his sentencing vacated and to be granted a new trial pursuant to his constitutional guarantees to be reviewed during the present proceedings. Appellant has alleged that his trial should not have proceeded in that he was not medically, mentally, or physically competent to stand trial and subsequently had no sufficient ability to consult with his lawyer with a reasonable degree of rational understanding of the proceedings.

In an order made and entered on the 16th day of December, 1976 the Honorable Edward Weinfeld, United States District Judge for the Southern District of New York, nevertheless denied petitioner appellant's application pursuant to Section 2255 of Title 28 of the United States Code. Judge Weinfeld's opinion dated October 20, 1976 indicated that this was "the not

uncommon situation encountered now and then during an extended trial where a defendant temporarily becomes or believes he is ill and signs himself into a hospital for examination with the hope of delay or a trial severance."

To the contrary a close reading of the record strongly indicates that petitioner's condition was by no means a "temporary" situation but a neurological problem of some magnitude, supported by a history of illness which should have been a very real consideration by the trial court, and that the fact that the court was dealing with "a brain-damaged individual" should have created a question of law as to the petitioner-appellant's right to a new trial or at least his right to a hearing as to his competency.

On December 24, 1976 the petitioner-appellant filed a notice of appeal from the order of Judge Weinfeld and the current appeal comes about pursuant thereto.

POINT I

THE CONVICTION & SENTENCE PURSUANT TO WHICH PETITIONER APPELLANT YANNI IS BEING DETAINED WAS IMPOSED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT THERE WAS AND IS SUBSTANTIAL EVIDENCE THAT THE PETITIONER-APPELLANT YANNI WAS MENTALLY INCOMPETENT AT THE TIME HE STOOD TRIAL AND THAT THE APPELLANT'S COMPETENCY SHOULD HAVE BEEN DETERMINED AT A HEARING OF SAME TO HAVE BEEN DIRECTED BY THE COURT.

Among the most essential constitutional guarantees and safeguards afforded defendants in criminal proceedings is that a trial court has a duty to conduct a due process hearing when an issue arises as to the competency of such individual to stand trial.

In the case at bar the transcript reflects that on several occasions the trial court found it necessary to order the trial to continue subject to an offer by petitioner-appellant Yanni of "competent medical proof that he is not fit to stand trial" (TR at p. 1512). As reflected in the introduction to the appellant's brief herein, the trial transcript is abundant with instances wherein the court took actions which reflected that the trial judge was so much in doubt as to the defendant's mental competency that the court repeatedly referred to the condition of the defendant and even urged trial counsel for the defendant Yanni to come forward with the proper offer of proof or, perhaps, with the proper motion for the defendant Yanni to be committed for mental examination. All of the foregoing would seem to reflect that the trial judge believed it was the responsibility of appellant's trial counsel, rather than of the court, in the first instance, to halt the trial and to proceed with a hearing as to the mental competency of the appellant.

The court's awareness of the seriousness of appellant's condition cannot be denied in that the trial transcript abundantly reflects the court's acknowledgement of the appellant's condition. At one point, in fact, the court noted that:

"today when Mr. Yanni walked out on several occasions his balance seemed badly affected. He lurched and almost fell into one of the seats back there. He is noticeably paler than he has been at any time since I have seen him all summer."

His trial counsel Mr. Alperin responded:

"Your Honor knows how I have from the very beginning felt that the man is a very sick individual."

The court then stated:

"Today he alarmed me because on other days he has tried his best sitting back there and he seemed by and large all right, but today his motor system or his central nervous system or something seemed possibly badly awry." (TR at p. 2845)

Case law has solidly supported the proposition that the court should take into careful consideration any indications which might raise a reasonable and bona fide doubt as to an individual's competency to stand trial:

"If any information coming to the attention of the court raises a bona fide doubt of the defendant's competency to . . . stand trial, it is the inescapable duty of the court to conduct a due process hearing to determine competency and to make appropriate findings."

Wolcott v. United States, 407 F.2d 1149, 1151 (10th Cir., 1969), Cert. denied, 396 U.S. 879, 90 S. Ct. 156 (emphasis supplied). United States v. Bettenhausen, 499 F. 2d 1223, 1228 (10th Cir. 1974).

The appellant concedes that neither the court nor appellant's trial counsel ever made a formal motion for such a hearing. Perhaps trial counsel

for the appellant can be, and should be, charged by the defendant with ineffective aid of counsel for his failure to formally move the court for an adequate mental examination. In addition, perhaps had Mr. Yanni been able to consult with his trial counsel with a reasonable degree of rational understanding he might properly have been able to assist his counsel at trial. However, because of the aforementioned mental and neurological difficulties appellant's recurrent headaches, loss of memory, seizures and fainting spells made it virtually impossible for him to properly prepare for trial with his trial attorney or even to be able to properly listen to and understand the proceedings against him. Appellant's marked inability to remember from one minute to the next what he wanted to say to his trial counsel prevented him from being the master of his servant, his trial counsel. The foregoing factors far from representing vague theories, find their very evolution in constitutional guarantees of due process:

"The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom is in reality afforded no opportunity to defend himself." Foote, "a Comment on Pre-Trial Commitment of Criminal Defendants", 108 U. Pa. L. Rev. 832, 834 (1960)."

On the other hand, in spite of trial counsel's failure to formally move the court and in spite of appellant Yanni's inability to so master and advise his attorney, case law indisputably resolves this issue by placing the duty "upon the trial court" to halt all proceedings in a criminal trial, whenever any information or thought is apparent that there is some question as to the defendant's mental competency at the time of trial or for that matter at the time of the commission of the offense.

"Where sufficient doubt is raised as to a defendant's competence to stand trial, it is the duty of the trial court to determine that matter." (emphasis added). United States ex. rel. Curtis v. Otis, 344 F. Supp. 728 (S.D. N.Y., 1972).

It certainly cannot be questioned that there was more than "sufficient doubt" created on the part of the trial court in the current action. Nevertheless, the transcript will verify that the court's reaction was limited to urging trial counsel to come forward. However, counsel failed to formally do so, as pointed out by the government on numerous instances in the government's answer to Yanni's motion to vacate.

While the opinion of Judge Weinfeld is heavily based on his interpretation that the court "did not have reasonable cause to believe (petitioner) was mentally incompetent" this is contrary to the numerous transcribed events delineated in appellant's introduction to this brief and to the already cited words of the trial court itself voicing concern over the appellant's condition. (TR at p. 2845).

The duty of the trial court as to the determination of defendant's competence to stand trial where "sufficient doubt" is raised, United States ex. rel. Curtis v. Otis, 344 F. Supp. 728 (S.D. N.Y., 1972), has been further supported by case law holdings that the court must conduct a hearing, sua sponte, any time prior to or during the trial when it receives this information as to incompetency, Tillery v. Eymann, 492 F. 2d 1056 (9th cir. 1974). Furthermore, "a judge's responsibility to guard against the possibility that the accused may have become incompetent does not end when the trial begins". Pouncey v. United States, 349 F. 2d 699 (D.C. Cir. 1965).

In numerous cases the courts have considered various types of

"information" in determining whether there is the requisite "reasonable" doubt to require a hearing as to appellant's competency. The courts have considered a defendant's courtroom demeanor and behavior Rand v. Swensen, 501 F. 2d 394 (8th cir. 1974); the defendant's activities outside the courthouse. United States v. Doran, 328 F. Supp. 1261, 1263 (S.D. N.Y. 1971); the defendant's present physical condition. United States v. Landsman, 366 F. Supp. 1027, 1028 (S.D. N.Y. 1973).

In the present case it would appear that the court, in observing the various incidents indicating appellants mental and neurological problems, should have ordered such a hearing on the basis of what it had observed in order to preserve and protect the appellant's constitutional guarantees of due process.

Where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing . . . "Pate v. Robinson, 383 U.S. 375, 385; 86 S. Ct. 836, 842 (1966) (emphasis supplied). See also, Grissom v. Wainwright, 494 F. 2d 30 (5th cir. 1974); Martin v. Estelle, 492 F. 2d 1120 (5th cir. 1974). Pate additionally requires an inquiry into the defendant's competency whenever it becomes manifest that there is "reasonable cause" to believe the defendant is incompetent. United States v. Marshall, 458 F. 2d 446, 450 (2d cir. 1972). Furthermore, Pate specifically alludes to the fact that the "mental alertness and understanding" of the defendant is a significant consideration in determining whether there is the requisite "reasonable" doubt to require a hearing as to competency. Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842 (1966). In the case at bar it can hardly be denied that the court was fully cognizant of the effect the defendant's mental and medical problems had had

on his alertness and ability "to follow" the proceedings. (TR at p. 2845)

It is well settled that a defendant, who has been convicted while he is incompetent to stand trial, has been deprived of due process. United States v. Knohl, 379 F. 2d 427, 434 (2d 1967), cert. denied 389 U.S. 973, 88 S. Ct. 472 (1967). United States ex. rel. Rizzi v. Follette, 367 F. 2d 559 (2d cir. 1966); Clark v. Beto; 359 F. 2d 554 (5th cir. 1966); Bishop v. United States; 350 U.S. 961, 76 S. Ct. 440, (1956).

Futhermore, it has been established that defense counsel can not validly waive a defendant's right to the determination of his competence to stand trial except with the defendant's express and understanding approval. United States ex. rel. Curtis v. Otis, 344 F. Supp 728 (S.D. N.Y., 1972). In fact, the defendant himself cannot even prevent the court from injecting the competence question. Whalen v. United States, 346 F. 2d 812 (D.C. Cir. 1965).

In the case at bar the transcript is replete with testimony by the appellant that he not only was not waiving his right to a determination of his competency to stand trial, but that, quite the contrary, he was, in fact, actively pursuing this right and requesting a full examination and help from the court (TR p. 1521-1522).

Against this background it was error to proceed with the trial and to proceed with sentencing in that it should have been apparent to the trial court that appellant lacked the mental capacity to stand trial as well as the capacity to exercise his right of allocution. United States v. Malcolm, 432 F. 2d 809 (2nd cir., 1970). The court's proper course in respect to the preservation of the appellant's due process rights would have been to take cognizance of the appellant's history of illness, of his present incapacities

and to so halt the trial and defer sentencing at least pending the conduct of a court-ordered § 4244 examination and hearing to ascertain his capacity to proceed. Furthermore, having been alerted by this flurry of warning flags to the possibility that appellant might have been mentally incompetent to stand trial from the outset, the court could have directed that the § 4244 examination be initiated at the outset of the trial as opposed to merely suggesting to the appellant that he make access of the dispensary on the first floor, if at any point he felt that he'd like to "lie down for a bit or perhaps get some medication" (TR at p. 1521). Had the course of ordering such a court-ordered § 4244 examination and hearing been pursued we would not now be faced with the necessity of ordering a retrospective examination, a course which has been followed in cases where, as here, no reasonable alternative remains if we are to respect the due process rights of the petitioner-appellant. See United States ex. rel. Suggs v. LaVallee, 523 F. 2d 539 (2d cir. 1975); Miranda v. United States, 458 F. 2d 1179 (2d cir. 1972); Conner v. Wingo, 429 F. 2d 630 (6th cir. 1970).

While the petitioner-appellant herein was undoubtedly damaged by his trial counsels' failure to come forward with the proper motion for such a hearing, for the court to then fail to take the initiative upon being alerted by the numerous warning flags as to the possibility of appellant's mental incompetency was to ignore the inescapable duty of the court to conduct a due process hearing to determine competency and to make appropriate findings upon the event that such information had come to the courts attention. United States v. Bettenhausen, 499 F. 2d 1223, 1228 (10th cir. 1974); Grissom v. Wainwright, 494 F. 2d 30 (5th cir. 1974); Martin v. Estelle, 492 F. 2d 1120 (5th cir. 1974); United States v. Marshall, 458 F. 2d 445, 450 (2d cir. 1972); United States

ex. rel. Curtis v. Otis, 344 F. Supp. 728 (S.D. N.Y. 1972).

Accordingly, the conviction and sentence pursuant to which petitioner-appellant Yanni is currently being detained was imposed in violation of the due process clause of the fourteenth amendment in that there was and is substantial evidence that the petitioner Yanni was mentally incompetent at the time he stood trial and the appellant should have been afforded the constitutional right to have his competency determined at a court-ordered hearing.

POINT II

PETITIONER APPELLANT IS ENTITLED TO HAVE HIS SENTENCE VACATED AND BE GRANTED A NEW TRIAL OR IN THE ALTERNATIVE TO HAVE THE AFORESAID CHARGES DISMISSED IN THAT AN ACTION WAS PROPERLY INITIATED PURSUANT TO SECTION 2255 OF TITLE 28 OF THE UNITED STATES CODE IN PRESERVATION OF HIS RIGHTS THEREFORE

It is well established that the question of the mental competency of a convicted defendant at the time of his trial or entry of plea may be raised by a motion to vacate the sentence under Section 2255. Bishop v. United States, 350 U.S. 961, 76 S. Ct. 440, (1956), Birdwell v. United States, 345 F. 2d 877 (9th cir. 1965). Accordingly, the appellant herein does have a constitutional right to bring an action under Section 2255 after sentencing to raise the issue of whether he had been mentally competent at the time of the trial of his matter.

This motion to vacate can be made because "a defendant who has been convicted while he is incompetent to stand trial, has been deprived of due process". United States v. Knoch, 379 F. 2d 427, 434 (2d cir. 1967), cert. denied, 389 U.S. 973, 88 S. Ct. 472 (1967). Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966); United States ex. rel. Rizzi v. Follette, 367 F. 2d 559 (2d cir. 1966); Clark v. Beto, 359 F. 2d 554 (5th cir. 1966).

Furthermore, case law has established that a defendant need not have raised the competency issue at his trial in order to have the right to raise this issue in a section 2255 proceeding. Smith v. United States, 267 F. 2d 210, 212 (9th cir. 1959). See also, Smith v. United States, 259 F. 2d 125 (9th cir., 1958).

In spite of the foregoing precedents the Honorable Edward Weinfeld,

United States District Judge for the Southern District of New York, in his decision dated October 20, 1976 in determining that the petitioner's application was "wholly without merit" stated that "with all the events known to trial counsel, no motion was made to set aside the jury verdict or to vacate the judgment of conviction on the grounds now proffered, nor was the contention urged upon appeal for reversal of the judgment."

Petitioner-appellant has already conceded that perhaps trial counsel for the appellant can be, and should be, charged by the defendant with ineffective aid of counsel for his failure to formally move the court on the above mentioned grounds. Nevertheless, appellant would hope to be afforded those constitutional guarantees to which he is entitled. As previously alluded to in Point I of this brief, the court itself had the duty to determine the matter of defendant's competency to stand trial and should have held a competency hearing to preserve the defendant's due process rights upon being made so fully cognizant of defendant's condition as supported by the trial transcript itself. Additionally, the aforementioned cases have supported the proposition that even in the face of the failure of the competency issue to be raised at all at trial the appellant still preserves the right to raise it in the Section 2255 proceedings. To now state that such application is "without merit" is in derogation of these principles of law.

Equally disturbing is the fact that Judge Weinfeld's opinion is heavily weighted on his statement that the court observed "in somewhat of an understatement that it all seemed very peculiar that although Dr. Messer, a qualified neurosurgeon, had been treating petitioner for over two (2) years petitioner suddenly chose to go to the Pelham Bay Hospital, which is a considerable price from where he lives here in New York, and (deal) with physicians

who were not neurologists at all and . . . had had nothing to do with his former neurologist or neurosurgeon, Dr. Messer"...The discrepancy here is over a misinterpretation as to exactly why Mr. Yanni was admitted to Pelham Bay Hospital. A careful reading of the transcript and the medical evidence in this case will verify that appellant no longer lived in New York City at the time he suffered the epileptic convulsion which necessitated his hospitalization at Pelham Bay (TR at 1510). In fact, appellant pointed out that he had suffered this convulsion while riding in his brother-in-law's car (TR at 1522) and that they simply drove to the closest hospital for medical care. Neither the appellant nor his brother-in-law had ever heard of Dr. Perotta, the attending physician. In sum, for the opinion to have been so heavily weighted on unsupported allegations of petitioner's sudden hospitalization being "calculated to force a mistrial" is highly conjectory and prejudicial to the petitioner. Undoubtedly, a proper competency hearing would have served to verify the severity of appellant's condition and of his need for immediate hospitalization for the treatment of an epileptic convulsion as opposed to the prospect of driving appellant all the way to New York City for treatment by his regular neurologist. Yet no such examination was forthcoming.

In short, it was the very purpose of appellants motion pursuant to Title 28 U.S.C. Section 2255 to have all of the foregoing factors considered in determining whether he was entitled to have an order entered vacating his sentence. The very fact that no competency hearing was held left much question in regard to whether the trial court gave adequate consideration to petitioner's history of mental incapacities. All of these questions could have been resolved had the trial court held a competency hearing to finally determine these matters.

Such a hearing would have brought to light additional considerations as to appellant's state of competency at trial. In lieu of the fact that no hearing was ever held these factors never even came into the open despite the court's open cognizant of appellant's condition. In addition to appellant's physical, medical and mental incapacities the fact might have further been brought to light that appellant was severely incapacitated by the narcotic drugs taken to control his condition. It has been established that evidence may be insufficient to support a court's determination that narcotics administered to a defendant were of a nature and in an amount that could not have affected his powers and faculties at trial. Manley v. United States, 396 F. 2d 699 (5th cir. 1966).

Certainly such an issue would have been properly raised by a Section 2255 motion in that a claimed incapacity at time of trial due to drugs is a proper matter for inquiry on a motion to vacate and set aside a judgment and sentence. Pledger v. United States, 272 F. 2d 69 (4th Cir., 1951).

By any consideration, however, the information which actually was in front of the court, should have compelled it to hold a hearing as to appellant Yanni's mental capacity. This issue was properly raised with considerable merit by appellant's Section 2255 motion. Accordingly, and in keeping with numerous appellate decisions the appellant should have been given a competency hearing and it was prejudicial error that such a hearing was not held.

The United States Supreme Court has ordered hearings in a number of matters similar to that in the present case. See Ives v. United States, 421 U.S. 944, 95 S. Ct. 1671 (1975). Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896 (1975); Jones v. Kentucky, 421 U.S. 943, 95 S. Ct. 1671 (1975).

In Ives v. United States, 421 U.S. 944, 95 S. Ct. 1671 (1975), the

Supreme Court reversed the Circuit Court of Appeals (504 F. 2d 935) and granted a new trial for the defendant because he had not been allowed a hearing as to competency. As in the facts of the present case, the Circuit Court in Ives found competency based upon the report of a psychiatrist and it did not hold a hearing. This was held to be reversible error by the Supreme Court.

In Moore v. United States, 464 F. 2d 663 (9th cir. 1972), a psychiatrist report referring to the defendant's extensive history of mental illness was presented to the court. The court subsequently received reports from the Federal Bureau of Prisons and held that they "constituted substantial evidence casting a reasonable doubt upon Moore's competency to stand trial as a matter of law". Since this information "compelled a Pate evidentiary hearing" and none was ordered, the court ruled that the defendant was deprived of his constitutional right to a fair trial and a new trial was ordered.

In the case at bar, not only was the trial court aware of appellant Yanni's "extensive history" of medical and mental problems but it personally witnessed the appellant's courtroom demeanor, his medical problems outside the courtroom, and even discussed with appellant's trial counsel the extensive doubt as to defendant's mental condition.

In the landmark decision of Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966) the Supreme Court held that the defendant's constitutional right to a fair trial had been violated because the trial judge did not make proper inquiries into the area of the defendant's competency. A careful review of the case at bar will indicate that in the current case the trial judge had even more notices of the defendant's mental and medical problems than in the Pate decision.

So too do the facts in Brewster v. United States, 437 F. 2d 917 (9th cir. 1970) closely parallel those in the case at bar. In Brewster the defendant had been found competent on the basis of a psychiatrist's report and without an evidentiary hearing. The defendant subsequently had alleged that the psychiatric report was based upon an inadequate examination, and a Section 2255 motion was raised containing allegations of fact throwing further doubt upon Brewster's mental capacity. In the current case as well, appellant Yanni alleged that his psychiatric report was based upon an inadequate examination (TR at pp. 1516, 1519, 1520); here as well the defendant suffered from brain damage; and appellant Yanni filed a Section 2255 motion containing allegations of fact which should have cast doubt upon his mental capacity. The court in Brewster held:

"In our opinion the motions, files and records reveal no other circumstances . . . which conclusively show that Brewster is not entitled to relief on his incompetency allegations."

Recently this very court in Saddler v. United States, 531 F. 2d 83 (2nd cir. 1976) considered a set of facts where a trial judge had been given "reasonable grounds" to doubt a defendant's competence to stand trial. In a similar appeal from a district court's denial of a motion to vacate a conviction without a proper mental examination, this court held that since the trial judge was aware of the petitioner's medical history and of his present incoherence that the proper court would have been to defer sentencing pending a proper ". . . court ordered examination and hearing to ascertain petitioner's capacity to proceed . . .". Furthermore, the Saddler decision determined that since such examination had not been ordered, it was proper to order a retrospective examination to determine, among other things, petitioner's present

mental capacity to undergo trial or sentencing, some three (3) years later.

As to the factor that trial counsel in the case at bar failed to formally move for a mental competency examination of the defendant, this issue too has been met head-on in a 9th circuit decision. In Reed v. United States, 391 F. 2d 4 (9th cir. 1968) the district court stated as follows:

"The trial record is strong evidence that he was then neither insane nor mentally incompetent. Neither the United States attorney nor Reed's able trial counsel nor the court ever suggested the possibility of insanity or lack of mental capacity; Reed took the stand in support of a motion to suppress and testified clearly, rationally and in circumstantial detail about his arrest; his counsel's cross examination of government witnesses, indicates that Reed provided intelligent assistance. We can readily understand how a trial judge could feel that such a record 'conclusively show(s) ' that Reed is entitled to no relief' (28 U.S.C. Section 2255 i.e. that he was able to 'understand the proceedings against him' and to properly assist in his own defense." (18 U.S.C. Section 4244) Id. at 617.

Nevertheless, the court of appeals reversed the District Court in Reed, stating:

"The Criminal Code itself contemplates the possibility that the type of incapacity defined in Section 4246 may exist without being apparent to those participating in the trial (18 U.S.C. Section 4245). Further, in a somewhat comparable case, the Supreme Court similarly reversed for a hearing. Bishop v. United States, 1956, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835, reversing Bishop v. United States, 1955, 96 U.S. App. D.C. 117, 223 F. 2d 582. Id.

See also, Norman v. United States, 276 F. 2d 377 (9th cir. 1960).

In the current case while trial counsel, as in the Reed decision

did not formally move for a competency hearing the trial court did, at least, have cognizance of the appellant's condition and of the strong possibility of his mental incapacities far beyond the evidence before the Reed court. Nevertheless, the district court has denied appellant Y. I.'s request for relief.

Recently the United States Supreme Court has even gone so far as to specifically deal with the issue of whether a defendant's matter as to competency in a past trial should be remanded for a hearing as to competency or be granted a new trial. In Droppe v. Missouri, 420 U.S. 162, 95 S. Ct. 896 (1975), it was decided that a defendant, in a similar position as that of the appellant herein, should be granted a new trial as opposed to merely a hearing as to his competency at the previous trial. The court stated:

"The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here. The State is free to retry petitioner, assuming of course, that at the time of such trial he is competent to be tried.

In conclusion Title 28 U.S.C. Section 2255 provides in pertinent part:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

In consideration of all of the factors and case authority cited

herein the petitioner-appellant respectfully submits that the records of his case conclusively show that he is entitled to relief pursuant to Section 2255 of Title 28 of the United States Code.

CONCLUSION

The petitioner-appellant respectfully requests that this court reverse the order of the Honorable Edward Weinfeld, United States District Judge for the Southern District of New York denying his application pursuant to Section 2255 of Title 28 of the United States Code and that an order be entered vacating his sentence, and ordering a new trial, or in the alternative dismissing the charges against him.

Respectfully submitted,

SIEGEL, MCGEE, KELLEHER, HIRSCHORN
& MUNLEY,
Attorneys for Petitioner-Appellant,
Vincent D. Yanni,
426 Franklin Street,
Buffalo, New York 14202
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A1

APPENDIX

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

VINCENT YANNI

Petitioner

vs.

**MOTION TO VACATE
SENTENCE**

UNITED STATES OF AMERICA

CIVIL NO.

Respondent

Comes to petitioner, VINCENT YANNI, and moves this court pursuant to Title 28 U.S.C. Section 2255 to enter an order vacating his sentence.

1. Petitioner Yanni is presently serving a sentence of eight years under criminal indictment number 72-CR-810 for conspiracy to distribute narcotics in violation of Title 26 U.S.C. Sections 4705(a) and 7237(b) and Title 21 U.S.C. Section 846.

2. Sentence was imposed by Judge Harold R. Tyler, Jr. of the United States District Court for the Southern District of New York on the 3rd day of November, 1972 after a jury trial verdict of guilty.

3. Petitioner Yanni is presently confined to the United States Penitentiary at Lewisburg, Pennsylvania.

4. Petitioner Yanni has appealed, on issues other than those raised in this petition, to the United States Court of Appeals for the Second Circuit and to the United States Supreme Court; both appeals have both been denied. (Second Circuit opinion decided November 23, 1973; U. S. Supreme cert. denied.)

5. The conviction and sentence pursuant to which petitioner Yanni is being detained was imposed in violation of the due process clause of the fourteenth amendment in that there was and is substantial evidence

that the petitioner Yanni was mentally incompetent at the time he stood trial.

6. The facts that made the court aware of this constitutional violation are, in part, as follows:

a. On September 2, 1972, during the trial proceedings, the court was informed that Mr. Yanni has an epileptic fit and was in the Pelham Bay General Hospital. (Transcript at pp. 1481 and 1507).

b. Mr. Yanni had a similar problem about a week before (Transcript at p. 1484).

c. A previous neurological examination was done by Dr. Shansey. (Transcript at p. 1499.)

d. Mr. Yanni had a history of head problems caused by a head injury of some magnitude. (Transcript at pp. 1505 and 1516.)

e. Dr. Henry D. Messer, neurologist had treated Mr. Yanni since January, 1970. (Transcript at p. 1498.)

f. Dr. Michael Nagle, neurologist, felt that Mr. Yanni needed immediate medical attention during the period around August 30, 1972. (Transcript at p. 1507.)

g. Dr. Fine, neurologist, conducted tests on Mr. Yanni on September 5, 1972. (Transcript at p. 1500.)

h. Mr. Yanni complained of severe head pains and had fallen down and cut his head. (Transcript at p. 1515.)

i. Drs. Fine and Perrotta said that Mr. Yanni was very sick. (Transcript at p. 1515.)

j. Mr. Yanni had once been confined to Bellevue for sixty days. (Transcript at p. 1517.)

k. Mr. Yanni has a ten year history of dizziness and passing out. (Transcript at p. 1520.)

1. The court did consider severance of Mr. Yanni's matter from the other defendants. (Transcript at p. 1483).

a. The court noted that: "today when Mr. Yanni walked out on several occasions, his balance seemed badly affected. He lurched and almost fell into one of the seats back there. He is noticeably paler than he has been at any time since I have seen him all summer." His attorney, Mr. Alperin responded: "Your Honor knows how I have from the very beginning felt that the man is a very sick individual." The court further stated: "Today he alarmed me because on other days he has been able to follow and he has tried his best sitting back there and he seemed by and large all right, but today his motor system or his central nervous system or something seemed possibly badly awry." (Transcript at p. 2845.)

a. The court had been given evidence as to Petitioner Yanni's medical condition. (Transcript at p. 1523.)

7. Petitioner Yanni had a previous medical history prior to the trial of:

- a. an accident causing brain damage.
- b. seeing Doctors Henry Messer (neurosurgeon), Dr. Vetter (psychiatrist), Dr. Bertero (M.D.) and Dr. Sisco (M.D.).
- c. being admitted to the Metropolitan Hospital, the Flower Fifty Avenue Hospital, and the Jacobi Hospital, all in New York City.

8. After the trial, Petitioner Yanni continued to have fainting spells, headaches, and seizures (For an example, see clinical record report attached as exhibit "A").

9. The psychiatric examination done of Petitioner Yanni during trial was based upon an inadequate examination. (Transcript at pp. 1519-20.)

10. Petitioner Yanni was mentally incompetent to stand trial or to undergo punishment thereof, due to an injury which caused brain damage inflicted upon him before the trial. Petitioner had received the severe head injury more than a decade before trial.

11. Petitioner's head injury causing headaches, loss of memory, seizures and fainting spells made it impossible for the Petitioner to properly prepare for trial with his attorney or even to be able to properly listen to and understand the proceedings against him.

12. Petitioner Yanni was not able to listen to some of the proceedings against him and was even initially unable to find where his jury trial was taking place. (Transcript at p. 38.)

Because of the foregoing facts, Petitioner Yanni is being restrained of his liberty by the respondent in violation of the Constitution of the United States, and he therefore prays that this motion be granted and an order entered to vacate his sentence pursuant to Drope v. Missouri, 420 U. S. _____ 95 S. Ct. 896, 909 (1975).

Michael R. McGee

MICHAEL R. McGEE, ESQ.

SIEGEL, McGEE, BARTLO, KELLEHER & HIRSCHOEN

Attorney for Petitioner

426 Franklin Street

Buffalo, New York 14202

Dated:

AS

STATE OF NEW YORK)
COUNTY OF) SS:
CITY OF)

VINCENT YANWI, being duly sworn deposes and says:

that deponent is Petitioner in the within action; that deponent has read the foregoing Notice to Vacate Sentence and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Vincent Yanwi
VINCENT YANWI

Sworn to before me this

28th day of August, 1975.

Michael R. McGee
Notary Public

MICHAEL R. MCGEE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

A6
CLINICAL RECORD

U.S. GOVERNMENT PRINTING OFFICE: 1953-O-551240

CLINICAL RECORD

HISTORY—Part I

NATURE AND DURATION OF COMPLAINTS (Include circumstances of admission)

Hx seizure

HISTORY OF PRESENT ILLNESSES

31 year old white male with Hx depressed skull fracture
L Parietal Area 16 years ago. No plate in place.

Has had post traumatic seizure approx 1/yr since.

Takes Luminal 300 mg and Dilantin 100 mg TID

No Med Record here. Transferred from Lewisburg.

12³⁰ pm 7th St struck R side of head on ground then had
clonic convulsion both arms & legs observed by officer.

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first,
middle; grade; date; hospital or medical facility)

REGISTER NO.
80452-158

WARD NO.

Yanni, Vincent D.

U.S.P.H.S.
U. S. Penitentiary
Atlanta, Georgia 30315

HISTORY—Part I

Standard Form 804
501-55

EXHIBIT "A"

is wrong right now. We can speak about possibilities of prejudice.

THE COURT: I have already made that observation and it is implicit -- it is explicit in my reserving decision on this motion. I am not about to resolve this motion until I read the articles and see what happens on the voir dire.

MR. EDELRHAUM: Your Honor, I expect Mr. Walker or the United States Attorney's office would not comment to the press on the non-appearance of Mr. Yanni. I would also ask that your Honor direct that no other agency of the government including --

MR. ALPERIN: He is here.

THE COURT: Now the record should reflect that Mr. Yazni is present in the courtroom.

MR. ALPERIN: He has been here less than five minutes after we discussed why he wasn't here. He said he was here since 9 o'clock in room 51A.

DEFENDANT YANHI: The guard told me 518 and I had to speak to the calendar clerk.

2. ALPERIN: I think your Honor's original observation was right.

THE COURT: Very good, I will accept the explanation and the record will note that Mr. Tamm came in about five

SOUTHERN DISTRICT JUDGE REPORTERS

UNITED STATES DEPARTMENT OF JUSTICE

NEW YORK, NY 10017 TEL: 212 398 1100 FAX: 212 398 1101

BEST COPY AVAILABLE

United States of America
vs.
Joseph Manfredi, et al.

September 5, 1972,
10 A.M.

(In the robing room with Messrs. Walker and Alperin present.)

MR. ALPERIN: I got home about 6 o'clock last night and my service called and then the defendant Yanni's wife called and his wife said to me that he had a fit. I think she meant an epileptic fit on Friday and that he got sick again Sunday, some time Sunday, and he was taken to the Pelham Bay General Hospital by his brother-in-law and he is in room 51 of Pelham Bay General Hospital, which is on Pelham Parkway in the Bronx.

I called the hospital and at that time they said they wouldn't connect me with the room. That was last night. That is as much as I could do last night.

I got in about 8 o'clock this morning and I called from the phone in the courtroom and they connected me with him and he was very hazy. He said they had given him a lot of drugs; that they wanted to run tests. They were doing brain waves and that Dr. Perrotta was his doctor and the doctor would be in in the afternoon and he would call or

* * *

1
2 that we ought to find out more than we know now before we
3 consider any possibility of severance from every point of
4 view, not just judicial economy. There are other factors,
5 too.

6 There is one thing which concerns me a little now
7 in this context: at least one of our male jurors is com-
8 plaining about problems of time and service, not that I
9 would regard this as too serious normally because, as you
10 both know, one of our common myths is that jury service
11 only lasts two weeks. This is thought to be the unwritten
12 rule number 1.

13 I can deal with that very easily by, if need be,
14 communicating with his employer or boss, but I mention that
15 now because I am a little bit uncertain what to do with
16 the jury. I hate to keep them sitting around. They have
17 been extremely patient with us.

18 MR. ALPERIN: I think Mr. Walker means to send
19 the doctor right to the hospital, not just to speak to Dr.
20 Perrotta over the phone.

21 MR. WALKER: I would like to have him examined
22 one way or another and what arrangements can be made for
23 this examination I don't know.

24 MR. ALPERIN: I know Mr. Tanni well enough to say
25 that he wouldn't oppose anything. He could come right in and

1 start examining. That is his kind of an attitude.

2
3 THE COURT: Well, you and he were cooperative--
4 when was it? -- a week or so ago when we had a similar prob-
5 lem, but albeit different as to its details, but apparently
6 similar. Do you want to have the same physician?

7 MR. WALKER: Yes, I would like to go right now
8 and see if I can get him to do it since he is aware of Mr.
9 Yanni's history. I think I can probably locate him at
10 Beekman Downtown Hospital or at Park Avenue.

11 MR. ALPERIN: Probably at his office.

12 THE COURT: You would like to do that before I decide
13 what to do about telling the jury?

14 MR. WALKER: Yes, your Honor. In any event, it
15 seems to me that it is going to take a substantial portion
16 of the morning to have the examination conducted.

17 THE COURT: It may take more than the morning.

18 MR. WALKER: It may well, your Honor.

19 THE COURT: Can you get Mr. Feffer or one of your
20 associates or do you feel you have to do this, that is,
21 tracking down the physician over here at Beekman Downtown
22 Hospital?

23 MR. WALKER: I think I can get Mr. Feffer to do it.

24 THE COURT: Why don't you see if you can get that
25 in motion and see what happens.

* * *

1 admit patients who came into the emergency room at the
2 hospital, and I said I asked him how he specifically had
3 come to admit Mr. Yanni, and he said that he had been
4 asked for by Mr. Yanni.
5

6 He said that he, however, was not a neurologist
7 himself and had no expertise in neurology, and that he
8 was turning the matter over to neurologists, and that he
9 himself had not conducted a neurological examination of
10 Mr. Yanni as of 3 o'clock this afternoon.

11 Now, thereafter I spoke to Mr. Alperin again.
12 Mr. Alperin gave me some further information. He said
13 that his brother took him to Pelham Bay Hospital, Mr.
14 Yanni's brother had taken Mr. Yanni to the Pelham Bay
15 Hospital, and that an individual named Dr. Fine was
16 supposed to be conducting tests on Mr. Yanni.

17 Now, against this information, your Honor, I
18 would point out that at the time that Mr. Yanni's
19 alleged condition was brought to the attention of the
20 Government for the first time, Mr. Alperin stated that
21 Dr. Henry D. Messer was a neurologist who Mr. Yanni had
22 had for some time, who had treated Mr. Yanni for some time,
23 and he has given me a letter dated June 5, 1972 in which
24 Dr. Messer says that Mr. Yanni first came to his care
25 January 13, 1978.

It should be noted that this recent incident in which Mr. Yanni is involved and has been admitted to the hospital for, it apparently did not involve Dr. Henry D. Messer in any way, shape or form, although he would have been the logical doctor to have seen Mr. Yanni and to have diagnosed any condition that he might have had.

THE COURT: As I recall, last week Dr. Messer was consulted at the same time that we had Dr. Shanzer examine Mr. Yanni last week and that Dr. Messer had concurred with Dr. Shanzer that there was no reason why Mr. Yanni couldn't continue in the trial, am I right?

MR. WALKER: That is correct, your Honor.

THE COURT: This all seems very peculiar.

MR. WALKER: Accordingly, it is the Government's belief that the Government should not be put here, and the Court should not be put here, to the burden of delaying this case because Mr. Yanni happens to take it into his own hands to go up to Pelham Bay Hospital to get admitted for some supposed tests which the Government now learns are being conducted a full day later after his admission, and at first I might point out that Dr. Perrotta said that they might very well be conducted tomorrow and not even today.

It seems to me that Mr. Yanni is taking matters into his own hands here and somehow hoping to avoid the

* * *

1 opinion, and he saw no change in Mr. Yanni's condition
2 at all since last week, or, to put it differently, he
3 concluded that there was no objective reason why Mr. Yanni
4 could not continue with the trial.

5 Now, in addition to that, Mr. Walker brought
6 out something which is very much in my mind, and that
7 is that you will recall that it has been brought to the
8 Court's attention that Mr. Yanni has had a history of
9 headaches and that some decade ago, or other, he sustained
10 a head injury of some magnitude.

11 You remember last week that when that came out,
12 to an extent, at least, there was a letter introduced
13 from a Dr. Messer who is, as I understood it then, and as
14 I understand it still, a qualified neurosurgeon or
15 neurologist, or both, and what puzzles me is that since
16 it came to our attention last week that Dr. Messer has
17 been treating Mr. Yanni for a period of over two years, I
18 cannot understand why in the world he, all of a sudden,
19 chose yesterday to go to the Pelham Bay Hospital, which is
20 a considerable piece from where he lives here in New York.
21 and dealt with physicians who were not neurologists at all
22 and, indeed, so far as I know, had had nothing to do with
23 his former neurologist or neurosurgeon, Dr. Messer, at
24 all.
25

Then Mr. Yanni went to another neurologist by the name of Nagle who I spoke to on the phone Thursday. His name is Dr. Michael Nagle. His address is 100 East 86th Street.

Dr. Nagle said that Mr. Yanni came in saying that Dr. Messer had been treating him all this time and the headaches were getting worse and that he thought he should see another neurologist.

Dr. Nagle said that he felt that Mr. Yanni should have some immediate medical attention. He understood about the trial and he asked Mr. Yanni to go there again Friday, and he had another appointment for Friday morning with Dr. Nagle.

I understand he had an epileptic seizure Friday morning. That is my information from his wife. He didn't see Dr. Nagle on Friday. Dr. Nagle was not in on Saturday or Sunday.

Sunday, I understand, he started to get sick again. Monday his brother or his brother-in-law -- I am not sure which -- took him to see Dr. Perrotta and have him admitted to the Pelham Bay Hospital. It was not Mr. Yanni that admitted himself. I understand it was his brother or brother-in-law who said "I know Dr. Perrotta. He is a good doctor. Go see him and he will have you

1 treated."

2
3
4 Now, Dr. Perrotta told me on the phone about
5 ten minutes of four that they had conducted quite a
6 few tests today on Mr. Yanni, that a Dr. Fine was the
7 neurologist who conducted the tests, and that he would
8 have a report, Dr. Perrotta would be speaking to Dr. Fine
9 some time this afternoon and would have the report for me
10 if I would call him at home at about 6.30, and that he
11 would be able to tell me more about Mr. Yanni's condition.
12 That's as far as I know.

3
13 I spoke to Mr. Yanni twice today. I called him
14 at about 8.30 this morning from this courtroom and he was
15 unable to communicate with me very well. He said that
16 they had given him a lot of medication and that he was
17 expecting to see the doctor. That was my conversation
18 this morning.

19 I called him again this afternoon at about 3.30
20 and asked him whether or not he could come to court in
21 the morning if he had to come.

22 He said the way he felt right now he could not
23 come, that they were continuing to give him medication
24 which was making him very sleepy and he was unable to
25 concentrate.

United States of America

Joseph Manixadi, et al.

September 6, 1972,
10 A.M.

(In the robing room with Messrs. Walker, Feffer
and Alperin present.)

THE COURT: Obviously I want to know what is afoot
so far as Mr. Yanni is concerned today.

MR. ALPERIN: He is here, but he is complaining
very seriously.

THE COURT: Is he.

MR. ALPERIN: He claims to have fallen down once
already and cut his head.

THE COURT: Do you have any medical evidence you
wish to present?

MR. ALPERIN: I spoke with Dr. Fine and Dr.
Perrotta last night before I called Mr. Walker. Both of
them say he is a very sick boy, but they can't, as doctors--
they don't want to come to court, that is obvious -- and
they also can't say with any degree of medical certainty that
he can't be here and if it came down to saying that he can't
be here as against saying he could be here, they wouldn't
take any position.

He complains because Dr. Spatzor came up with a rubber hammer and tapped three times and left him in five minutes and he thinks it is a terrible thing and he even suggested to me that he would go to the government hospital to be examined.

It is my opinion he is a sick boy and he really is upset about being sick. He has lived ten years, I think, with this brain injury and I think it is beginning to bother him emotionally and he wants somebody to help him. I think that is a part of his running around to these different doctors, you know. Headaches could be very subjective or objective, I don't know. I think he's got an emotional problem along with his physical problem.

I even said to him, well, the government would put you in Bellevue and he said, "I don't care. I just want to be helped."

So, that would be our alternative if he does state anything. I think he wants to make a statement. I advised him against it.

THE COURT: I can't disagree with your surmises here, you may well be right, but the point is it seems to me there is no real evidence that he is unfit to go forward. I have no doubt, on the other hand, that you are probably right. Without knowing it he may be seeking for some help

from somewhere and this may be partly emotional, it may be partly objective, I don't know, but I think there is one thing that we could consider doing.

Mr. Walker, I think, mentioned in passing to me recently and, as you know, we have down on the first floor a, I would call it a dispensary with a nurse on full-time duty down there. If Mr. Yanni were to feel that his condition would seem less painful or difficult for him by lying down at some given point, there is no reason why he can't go down there and lie down or see the nurse for that matter who is used to being a physician of sorts for all kinds of people of various walks of life within this large building.

There may be points in the trial where you and he would feel that it would be more advisable for him to wilfully absent himself for purposes of that kind of test or possible treatment of a sort.

MR. ALPERIN: I can suggest it to him. I have a feeling that he will sit there holding his head all morning.

THE COURT: He has been doing on many other occasions as you and I and everybody else knows, but I throw out. I don't want to ignore it because it has been done before by persons similarly situated, among others.

MR. ALPERIN: You see, he was once in Bellevue for 60 days in a state case. It was on a possession of

a weapon and as long as I could make it out he spent his 60 days in Bellevue and was released. Whether it was for psychiatric reasons or for the injury itself, I don't know. I haven't been able to get that out of him.

THE COURT: As you were forthright enough to observe, neither Dr. Perrotta nor Dr. Fine is prepared to come here and say that on the basis of objective medical evidence Mr. Yanni is incompetent to go forward in the trial. I feel that I must insist that the trial go forward, but, on the other hand, if he wants to come in and make a statement on his own I will permit it.

Secondly, I will be glad to tell him personally what I have just told you: that if there comes a point where he feels that his headache is such that he would like to go down and use the facilities of the dispensary or lie down or consult with the nurse for medication, there is no reason why that can't be done.

MR. ALPERIN: Judge, I would like to have him come in for the simple reason that I am not a doctor and I really can't say in my own mind whether he is very serious about this or whether it is what some people might believe to be a way out of the case. I would hate to think that one month, two months or three months from now that we made a mistake in treating him the wrong way, from my own

SHIRLEY M. BENTLEY COURT REPORTER

100 N. 10TH STREET, CHICAGO, ILL.

TELEPHONE 4-1111

eoh

conscience, and I would like him to make whatever statement he wants to make about his medical condition before your Honor.

THE COURT: I said if you and he want him to come in, you may do that.

MR. ALPERIN: I will ask him and see. He did mention to me that he would like to make a statement in the presence of Mr. Walker and your Honor. Let me ask him.

THE COURT: All right.

(Pause.)

(Defendant Yanni and Mr. Alperin enter the robing room.)

THE COURT: Sit down, Mr. Yanni. How are you?

Now, Mr. Yanni, Mr. Alperin says that you would like to make a statement yourself.

DEFENDANT YANNI: Yes, your Honor.

THE COURT: In the presence of the Judge and government counsel.

DEFENDANT YANNI: Yes.

THE COURT: So you go ahead.

DEFENDANT YANNI: What I asked for was something to be said. I don't want to be treated any better than anybody else, but I know that this doctor that Mr. Walker appointed, both times that he examined me was less than two

minutes with a rubber hammer and I can't see where he can tell me there is nothing wrong with me. I don't understand.

Your Honor, I have been dizzy and passed out many times way before this case. It has been going on for ten years. For him to walk in a room and tap my knee for less than two minutes both times and tell me there is nothing wrong with me, either he's crazy or he don't belong here.

THE COURT: My guess, Mr. Yanni, is that ever since let's say the day we started that suppress hearing on August 16th, I have noticed you many a time holding your head.

DEFENDANT YANNI: This is all the time.

THE COURT: Your head aches?

DEFENDANT YANNI: It's dizziness, not the headaches. Like I see here.

THE COURT: Now, I would suppose that it is possible that no doctor in the world can be sure of conducting any tests which would ascertain with certainty whether or not a man has a headache or not. I can understand that.

But, as I understand it, neither Dr. Ferrotta nor Dr. Fine, and we already know, of course, about Dr. Shanzer, this doctor that was sent up that you have just been talking about, no one of these gentlemen is willing to come in and tell the court that you are medically speaking incapable of

continuing in the trial, so I am going to direct --

DEFENDANT YANNI: Excuse me, your Honor. I am not saying I don't want to be here. I want to be here, but let them go through a full examination. This is all I am asking.

THE COURT: You apparently want some medical help.

DEFENDANT YANNI: Yes.

THE COURT: I can't blame you for that and I am not saying you are wrong, but what I am saying is this:

First of all, the trial must go forward.

DEFENDANT YANNI: Right.

THE COURT: Second of all, however, as I told Mr. Alperin, there is one thing that I want you to keep in mind. Downstairs on the first floor there is a dispensary. It is a rather complete operation. I don't want to suggest it is a hospital or a clinic, it isn't, but it is fairly complete. They have beds and there is a full-time nurse in attendance. If there comes a point where you feel you would like to lie down for a bit or perhaps get some medication, you have every right to let Mr. Alperin know and let me know. That is one thing.

Second of all, if you feel that you would like to get further tests by another physician or physicians --

DEFENDANT YANNI: A competent neurologist, that is all I am asking.

THE COURT: That is your business, but I would ask you this much: it would do a favor to you and everybody else in the case if you would let Mr. Alperin know in advance--

DEFENDANT YANNI: How would I know that, your Honor? These things happen, I don't arrange these things.

THE COURT: Get your wife to call. If it happens at home, get your wife to call. Sometimes they might and, if you can, all I am asking you is if you can, try to let Mr. Alperin know because one of the things that is a bit unsettling is that last week, so far as I knew, you were dealing with a neurologist named Dr. Messer and all of a sudden yesterday I hear about Pelham Bay Hospital and Dr. Perrotta, who isn't even a neurologist.

DEFENDANT YANNI: I didn't even know him and we were riding in the car and I got sick and my brother-in-law took me there.

THE COURT: I am trying to make a suggestion to you that if you want help it is certainly the last thing this court wants to do or I assume anybody else in this case wants to do is to deprive you of getting help.

DEFENDANT YANNI: I believe that on your part, your Honor.

THE COURT: All I am saying is so that we don't have an awful lot of misunderstanding possibly or unnecessary

delay or confusion. If you can either contact Mr. Alperin know or have your wife let him know or some other family member.

DEPENDANT YARNI: I was under the impression that I have to be here. I am willing to let Mr. Alperin go on with the case without me being here.

THE COURT: Unfortunately the law and indeed common sense, I think, suggests that we make an effort to find out if it is medically feasible for you to continue. From all the evidence I have heard it is medically feasible for you to continue. You are to be here to confront the witnesses against you.

Now, maybe you think that is wrong or a joke or whatever, but I am telling you right now I don't think it is very smart to have you absent yourself because I don't think that is helpful to your case. You are entitled to the fairest shake you can get and we have got to carry water on both shoulders. We don't want to make life unduly miserable for you in a medical sense, but, on the other hand, we don't want to overlook what is going on in the case.

Now, we will go ahead. If you feel at some time that you, after consultation with Mr. Alperin, that maybe there is a phase of the case which has nothing to do with you, for example, and you want to go lie down or you want to go

down to the dispensary, you have every right to let me know either directly or through Mr. Alperin.

Do you follow me?

DEFENDANT YANNI: Yes, your Honor.

THE COURT: I will do whatever I can to accommodate your interests, but I have got to also be concerned with the whole trial.

DEFENDANT YANNI: Yes, sir.

THE COURT: That is all I can say to you. All right.

DEFENDANT YANNI: Okay, your Honor.

THE COURT: Before you gentlemen go, Mr. Walker, is there anything the government wants to say?

MR. WALKER: Nothing further, your Honor, at this time.

THE COURT: All right, very well.

* * *

1
2 THE COURT: I just wanted to tell you and maybe
3 you saw this and maybe you know better than I do and I hope
4 you will take this in the spirit with which I give it, but
5 today when Mr. Yanni walked out on several occasions, his
6 balance seemed badly affected. He lurched and almost fell
7 into one of the seats back there. He is noticeably paler
8 than he has been at any time since I have seen him all
9 summer.

10 It is possible that it is just a fit of depression
11 and so on, but I am concerned that maybe it is more than
12 that.

13 MR. ALPERIN: Your Honor knows how I have from
14 the very beginning felt that the man is a very sick individual.

15 THE COURT: Today he alarmed me because on other
16 days he has been able to follow and he has tried his best
17 sitting back there and he seemed by and large all right,
18 but today his motor system or his central nervous system
19 or something seemed possibly badly awry. [ck]

20 One of the reasons I want to have him out on bail,
21 if he can make it, is to get himself attended to, but, if
22 he can't get himself attended to, I am worried about
23 him as a threat to himself and everybody else (lurching his
24 way around the way he does, so I insist that I have got to
25 have a report which I will want to be free to show to the

1 government so you might as well understand that.

2
3 MR. ALPERIN: I don't know that he will make ti.
4 bail. If not, it might be my suggestion that he be com-
5 mitted to some kind of a hospital.

6 THE COURT: If he can't make bail, then I am pre-
7 pared to recommend to the Warden at West Street that he
8 be hospitalized immediately for observation. I really think
9 so.

10 MR. ALPERIN: I felt the same way before so we
11 will see what happens.

12 (In open court.)

13 THE COURT: All motions are reserved until the
14 day of sentence.

15 MR. SILVERMAN: If your Honor please, I have a further
16 application. May I make a further application regarding
17 the bail for Charles Cassarella?

18 THE COURT: Do you want Charley to come up here?

19 MR. SILVERMAN: I have spoken to him and his wife
20 and he is unable to make the bail. The most he could make
21 is \$10,000. His mother has helped on his present bail and
22 that is all the money they have in the world.

23 He works in one of the shops of the New York Transit
24 Authority like a construction type of worker. He takes home
25 about \$212.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
VINCENT YANNI,

Petitioner, :

-against- :

UNITED STATES OF AMERICA, :

Respondent. :
-----X

76 Civil 4029

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Vincent Yanni, petitioner above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Edward Weinfeld denying petitioner-appellant's application pursuant to Section 2255 of Title 28 of the United States Code, said order having been made and entered on the 16th day of December, 1976.

Dated: December 24, 1976

Anthony B. Tohill
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AFFIDAVIT OF SERVICE BY MAIL

RE: Vincent D. Yanni

vs

U.S.A.

State of New York)
County of Genesee)
City of Batavia)

No. 77-2004

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 22nd day of February, 1977
I mailed copies of a printed Brief & in Appendix
the above case, in a sealed, postpaid wrapper, to:

2 copies (by Air Mail) to: Robert B. Fiske, Jr.
U.S. Attorney
Southern District of New York
U.S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10014

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Siegel, McGee, Kelleher, Hirschorn & Munley, Att: Michael R. McGee, Esq.

426 Franklin Street, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

22nd day of February, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977